Sklarew.

Comptroller General
of the United States

Washington, D.C. 20548

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Decision

Matter of: Israel Aircraft Industries, Ltd.--
Reconsideration

File: B-258229.2

Date: July 26, 1995

Melvin Rishe, Esq., and Richard L. Larach, Esq., Sidley & Austin, for the requester.
Christina Sklarew, Esq., and John Van Schaik, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where Defense Federal Acquisition Regulation Supplement clause referring to "governmental purpose" provides examples of types of activities that are included under this term but does not define the term, a proposed change to the clause that would retain the original language and add a definition of the term does not necessarily expand the clause beyond its earlier meaning, but simply provides clarification. Protester's disagreement with this analysis does not demonstrate error of law or otherwise warrant reversal of decision resting on that analysis.

DECISION

Israel Aircraft Industries, Ltd. (IAI) requests reconsideration of our decision Israel Aircraft Indus., Ltd., B-258229, Dec. 28, 1994, 94-2 CPD ¶ 262. In that decision, we denied IAI's protest against the release of certain technical data in connection with a foreign military sale (FMS) procurement, issued by the U.S. Army Tank-Automotive Command as request for proposals (RFP) No. DAAE07-94-R-A302. We also denied IAI's protest that the procurement should not be set aside for exclusive small business participation. IAI contends that our decision was flawed by errors of fact and law.

We deny the reconsideration request.

The RFP was for a quantity of Mine Clearing Blade Systems (MCBS) or "mineplows," which the Army required to fulfill its FMS obligations. A mineplow is a device that is attached to a battle tank and clears away mines to provide a lane for follow-on assault forces. In 1987, IAI developed

the mineplow at issue here under a sole-source, research and development contract for the U.S. Army. Under that contract, the Army obtained certain rights (labeled "Greater Rights" in the contract) to a technical data package (TDP) intended to allow the procurement of the mineplows on a competitive basis.

When IAI discovered that the current procurement involved FMS commitments for Kuwait and Saudi Arabia, it protested that the Army's rights in the TDP did not include the right to use the data to conduct an FMS procurement; that the dissemination of the TDP violated a Memorandum of Agreement (MOA) between the United States and Israel for mutual cooperation in research and development and procurement of selected defense equipment; and that the Army had improperly set the procurement aside for exclusive small business participation, thereby excluding IAI.

We noted that the Greater Rights that the Army had obtained were defined in the contract to include "the right to use, duplicate or disclose the TDP for Governmental purposes only," and determined that the Army could properly use the TDP in order to conduct an FMS procurement because the FMS program has a governmental purpose. We concluded that the MOA did not govern this acquisition, because the rights to the TDP were sold by IAI, acting as a commercial entity, for monetary consideration, and did not involve a data exchange between the two governments pursuant to this MOA. We also concluded that the Army's decision to set the procurement aside for exclusive small business participation was proper because the procurement history showed that four out of five firms that participated under the most recent acquisition for mineplows were small businesses; the small business awardee performed the prior contract successfully; and the four small business concerns had all requested a copy of the current solicitation. We therefore denied IAI's protest. IAI alleges that our decision contained errors of fact and errors of law and "missed the fundamental thrust of IAI's protest."

Under our Bid Protest Regulations, to obtain reconsideration, the requesting party must show that our prior decision may contain either errors of fact or law or present information not previously considered that warrants reversal or modification of our decision. 4 C.F.R. § 21.12(a) (1995). Here, while IAI alleges such errors, it fails to demonstrate error in either fact or law upon which our decision rests; rather, IAI disagrees with our analyses and conclusions. Mere disagreement with our decision does not warrant reversal or modification of the decision. R.E. Scherrer, Inc.--Recon., B-231101.3, Sept. 21, 1988, 88-2 CPD ¶ 274.

For example, IAI argues that our decision "purports to provide its own definition of 'Governmental purpose' and apply it to this situation. In so doing, the GAO committed a fundamental error of law." However, IAI acknowledges that neither the 1987 contract, the Defense Federal Acquisition Regulation Supplement (DFARS), nor the Arms Export Control Act (which governs FMS transactions) defines "Governmental purpose." IAI provides no legal authority to support any alternative definition of this term, nor does it demonstrate through logic or legal authority that our definition is incorrect. Rather, IAI disagrees with our conclusions and presents many of the same arguments that it used to support its initial protest.

IAI argues that we erred when we rejected IAI's argument concerning a regulatory reference to governmental purpose. IAI observed that some of the language in the Greater Rights provision in the 1987 contract was drawn from a clause dealing with Government Purpose License Rights that appears in the DFARS in connection with "Rights in Technical Data and Computer Software," see DFARS § 252.227-7013(a)(14), and that that definition did not mention FMS; however, because a proposed new definition of government purpose (published in the Federal Register, 59 Fed. Reg. 31605 (1994)) does specify that "sales by the United States Government to foreign governments or international organizations" would be included among government purposes, IAI argued that FMS transactions were necessarily excluded under the current definition, applicable to the protested solicitation.

We rejected this contention because we were not persuaded that the later decision to list FMS as a governmental purpose necessarily demonstrated an expansion of the scope of the term "government purpose"; we considered it just as likely that the decision to specifically list FMS was based on a determination to express that which was previously implied.

IAI argues, however, that this is an error of law because "the contrary proposition--that the new proposed regulation may reflect a determination to expand the definition of Government purpose--is more fully supported under precepts of statutory and regulatory interpretation." The protester argues that, as a matter of law, where the wording of a statute or regulation is changed, it must necessarily demonstrate an intent to confer a different meaning; therefore, the later express inclusion of FMS within "government purpose" must be seen as an expansion of the term.

We disagree. The case which IAI cites to support its argument, Muscogee (Creek) Nation v. Hodel, 851 F.2d 1439, 1444 (D.C. Cir. 1988), cert. denied, 488 U.S. 1010 (1989),

quoting the general statement that "[w]here the words of a later statute differ from those of a previous one on the same or related subject, the Congress must have intended them to have a different meaning," stated more specifically that "[i]t is contrary to common sense as well as sound statutory construction to read the later, more general language [in a modified statute] to incorporate the precise limitations of the earlier statute."

The current DFARS clause at issue states:

> "Government purposes include competitive procurement, but do not include the right to have or permit others to use technical data (and in the SBIR [Small Business Innovation Research] Program, computer software) for commercial purposes." DFARS § 252.227-7013(a)(14).

The definition included in the proposed clause states:

> "Government purpose means any activity in which the United States Government is a party, including cooperative agreements with international or multi-national defense organizations, or sales or transfers by the United States Government to foreign governments or international organizations. Government purposes include competitive procurement, but do not include the rights to use, modify, reproduce, release, perform, display, or disclose technical data for commercial purposes or authorize others to do so." 59 Fed. Reg. 31605 (1994).

Contrary to the situation in the case cited by IAI, the earlier government purposes language was more general, and the proposed language more specific; the earlier clause did not include any precise limitations that were to be replaced by the proposed clause. Rather, the proposed clause would add a definition of government purpose, while retaining verbatim the sentence that gives examples of government purposes in the current clause. Thus, the proposed clause can reasonably be seen as confirming the agency's interpretation of the clause from the start, rather than expanding the meaning of the clause to include FMS for the first time. We believe this is the most reasonable interpretation because the later language is not in conflict with the earlier language, but simply provides clarification.

More specifically, the current DFARS clause does not seek to define "government purpose," but only to give examples of what types of activities are included and not included, i.e., competitive procurement is included but commercial

purposes are not.[1] The proposed clause, however, does define "government purpose," as indicated by its use of the verb "means," rather than "includes." Thus, considering the two clauses for the commonly understood meaning of their terms, it is apparent that they are not inconsistent; that the proposed clause offers more information than the current clause but does not change its basic meaning; and that there is nothing to indicate that the current regulation excludes FMS transactions. Further, the reference to "government purpose" in the current regulation appears in the FAR in the context of specific license rights which were, in fact, not conferred by the 1987 contract.[2]

Moreover, even if we did not agree with the agency's interpretation of the clause, our Office is required to give deference to an agency's reasonable interpretation of its regulations, DWS, Inc., 66 Comp. Gen. 155 (1986), 86-2 CPD ¶ 681, and thus we would be required to accord deference to the interpretation of a Department of Defense (DOD) agency, since DOD promulgated the DFARS. The Supreme Court has held that "when faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. . . . When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order." Udall v. Tallman, 951 F.2d 1571, 1578 (10th Cir. 1991). We find no error of law in our decision on this point.

IAI again argues that the release of the TDP to prospective competitors effects a commercial purpose, rather than a governmental purpose, if not to the Army, then to the contractor receiving the data. IAI contends that offerors receiving the TDP for the purpose of preparing proposals for

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[1]Since an FMS procurement is one example of a competitive procurement, we fail to see how the current FAR clause could be read as excluding FMS.

[2]The record showed that IAI initially proposed a Government Purpose License Agreement that would have limited the Army's rights to permit using the TDP for proposal preparation and contract performance in connection with "other than FMS procurements"; however, the Army refused to accept that agreement, and eventually the parties agreed on a "Greater Rights" clause. While the current DFARS clause concerning Government Purpose License Rights had some relevance here, since the Greater Rights language was drawn from it, the relevance of the proposed regulation is tangential in any event.

a FMS procurement would be using the data for a commercial, rather than governmental, purpose.[3]

We disagree. The Greater Rights clause in the contract confers the right to

> "use . . . or disclose technical data . . . for Governmental purposes only, and to have or permit others to do so for Governmental purposes only. Greater rights include purposes of competitive procurement but do not grant to the Government the right to have or permit others to use technical data for commercial purposes." (Emphasis supplied.)

In a prior procurement, IAI did not object when a competitor, Minowitz Manufacturing, obtained the TDP in order to perform a contract to supply the mineplows to the Army. Similarly, the basis for IAI's objections here is not that the TDP is being disclosed to other firms in connection with a competitive procurement, but that it is being disclosed in connection with an FMS procurement. Under the construction that IAI now urges for "commercial," in which that term relates to the contractor's purpose, rather than the government's, the Army could not release the TDP to any contractor who would use it for commercial gain, and thus no contractor could ever be granted access to the TDP.[4]

IAI also argued in its protest that the use of the TDP in connection with the FMS procurement violated the terms of the bilateral MOA between the United States and Israel. We

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[3]In this connection, IAI argues that only government-to-government FMS sales have a governmental purpose, and that such sales necessarily mean sales of goods initially procured by the U.S. as the end user and then sold to a foreign government from U.S. stocks. In its protest, IAI cited the Defense Security Assistance Management Manual (DOD 5105.38-M), section 7, pp. 701-16 for the proposition that for government-to-government FMS sales, "the USG [United States Government] will furnish the items from its stocks and resources, or will procure them under terms and conditions consistent with DOD regulations and procedures." IAI underlined the former clause, insisting that only a transfer of items from U.S. stocks was permitted. However, the latter clause--permitting procurement for the purpose of resale--directly contradicts IAI's position.

[4]Such restrictions could have been effected by conferring only "limited rights" on the government, see DFARS § 252.227-7013(a)(15); however, the 1987 contract conferred Greater Rights.

concluded that the language that IAI had cited referred to technical data that was furnished by one of the two governments that was party to the agreement, and that it was therefore not applicable here. IAI argues that this conclusion was in error and, citing different passages from the MOA, argues that the agreement was intended to apply to private parties.

In our view, the passages IAI now quotes are irrelevant to the issue at hand. One passage states that the two governments "intend to facilitate the accomplishment of the above-stated aims . . . by allowing each other's national sources to offer products and services identified in Annex B hereto . . . ," and the other passage states that "full consideration will be given to all qualified industrial and/or governmental sources of the other country for items or services . . . ." We neither agree that these passages show the applicability of the MOA to private parties (since in both cases, it is government action that is addressed), nor do we find any basis in these arguments to invalidate our previous conclusions regarding the effect of the MOA on this procurement.

Finally, IAI repeats its objections to the Army's determination to set the procurement aside for exclusive small business participation. However, IAI's repetition of arguments made during our consideration of the original protest and mere disagreement with our decision do not meet the standard in our Bid Protest Regulations to obtain reconsideration. 4 C.F.R. § 21.12(a); R.E. Scherrer, Inc.--Recon., supra.

The request for reconsideration is denied.

for Ronald Berger
Robert P. Murphy
General Counsel